Supreme Court, U.S.
FILED
98 462 SEP 17 1998
OFFICE OF THE CLERK

No. 98-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street
Boston, MA 02108
(617) 720-5090

Counsel for Petitioner

36 pp

QUESTIONS PRESENTED

Frank Woodward was a state legislator who co-chaired the Massachusetts legislature's Joint Insurance Committee. William Sawyer was an insurance industry lobbyist who frequently lobbied that Committee. Woodward and Sawyer, and their wives and families, were also very close personal friends. Sawyer (through his employer) paid for $8,700 worth of meals, rounds of golf, and entertainment he shared with Woodward (and often their wives) over an eight year period. The questions presented are:

1. Whether Woodward could be convicted of theft of honest services, in violation of 18 U.S.C. §1346, without evidence that in exchange for these expenditures he agreed to perform specific official acts favorable to Sawyer's company which he would not have performed but for the expenditures.

2. Whether the Due Process Clause of the Fourteenth Amendment, overbreadth principles of the First Amendment, and the language of 18 U.S.C. §1346 permit Woodward's conviction for honest services fraud even when he had a dual intent in receiving the gratuities, and the unlawful portion of that intent was de minimis.

3. Whether a telephone call to reserve a hotel room for Sawyer at a conference during which Sawyer would subsequently pay for some meals and entertainment for Woodward, and the mailing of a credit card invoice to Sawyer several weeks after the conference itemizing these expenditures, were mere jurisdictional hooks to procure federal jurisdiction under 18 U.S.C. §§1341 and 1343 for the federal prosecution of state ethics violations.

PARTIES TO THE PROCEEDINGS

The Petitioner, Francis H. Woodward, was a defendant in the district court and an appellee in the First Circuit Court of Appeals, along with plaintiff-appellant the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
THE CIRCUIT COURT'S EXPANSION OF HONEST SERVICES FRAUD TO PERMIT CONVICTION WITHOUT PROOF THAT THE DEFENDANT PERFORMED A SPECIFIC OFFICIAL ACT IN EXCHANGE FOR A GRATUITY, OR THAT HE WOULD NOT HAVE PERFORMED THE ACT BUT FOR THE GRATUITY, CONFLICTS WITH THE LANGUAGE AND INTENT OF 18 U.S.C. §1346, AND WITH OTHER CIRCUIT COURT OF APPEALS DECISIONS	7

TABLE OF CONTENTS (continued)

		Page
THE CIRCUIRT COURT'S ENDORSEMENT OF JURY INSTRUCTIONS ALLOWING CONVICTION FOR DE MINIMUS UNLAWFUL INTENT THREATENS THE CRIMINALIZATION OF LAWFUL CONDUCT IN VIOLATION OF THE CONSTITUTION		17
THE CIRCUIT COURT'S AFFIRMANCE OF THE MAIL AND WIRE FRAUD COUNTS CONTRAVENES ESTABLISHED PRECEDENT OF THIS COURT AND VALIDATES THE GOVERNMENT'S ATTEMPT TO CONTRIVE FEDERAL JURISDICTION OVER ISSUES PROPERLY RESOLVED AT THE STATE LEVEL		21
A.	Introduction	21
B.	Wire Fraud (Count 9)	22
C.	Mailing (Count 4)	23
D.	Conclusion	25
CONCLUSION		26
APPENDIX A -- Order and Opinion of the United States Court of Appeals for the First Circuit		1a
APPENDIX B -- Relevant Constitutional and Statutory Provisions		57a

TABLE OF CONTENTS (continued)

	Page
APPENDIX C -- Indictment	59a
APPENDIX D -- Decisions Involving Deprivation of the Intangible Right to Honest Services by Public Officials	78a

TABLE OF AUTHORITIES

	Page(s)
U.S. Supreme Court Cases	
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	16
Kann v. U.S., 323 U.S. 88 (1944)	23, 24
Kolender v. Lawson, 461 U.S. 352 (1983)	15 n.11, 16
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973)	25
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	16
Parr v. U.S., 363 U.S. 370 (1960)	23, 24
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	15 n.11
Thompson v. City of Louisville, 362 U.S. 199, 204 (1960)	19
U.S. v. Anderson, 417 U.S. 211 (1974)	20 n.13
U.S. v. Brewster, 408 U.S. 501 (1972)	14 n.9
U.S. v. McNally, 483 U.S. 350 (1987)	9, 10
U.S. v. Maze, 414 U.S. 395 (1974)	23, 24

TABLE OF AUTHORITIES (continued)

	Page(s)
Federal Cases	
U.S. v. Bissell, 954 F. Supp. 841 (D. N.J. 1996)	9 n.6
U.S. v. Bloom, 1998 U.S. App. LEXIS 15988 at *23-24 (7th Cir. July 13, 1998)	9
U.S. v. Espy, 989 F. Supp. 17 (D. D.C. 1997)	9 n.6
U.S. v. Evans, 148 F.3d 477, 1998 U.S.App. LEXIS 16957 (5th Cir., July 24, 1998)	10, 25 n.17
U.S. v. Keane, 522 F.2d 534 (7th Cir. 1975)	8 n.5
U.S. v. Lopez-Lukis, 102 F.3d 1164 (11th Cir. 1997)	11
U.S. v. Paradies, 98 F.3d 1266 (11th Cir. 1996), cert. denied 117 S.Ct. 2483 (1997)	8 n.5, 11
U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996)	passim
U.S. v. Silvano, 812 F.2d 754 (1st Cir. 1987)	8 n.5, 11
U.S. v. Williams, 1998 U.S. Dist. LEXIS 8352 at *5 (D. D.C. May 29, 1998)	9 n.6
United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976)	12

TABLE OF AUTHORITIES (continued)

	Page(s)
United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978)	12
Rules and Statutes	
18 U.S.C. §1341	5
18 U.S.C. §1343	5
18 U.S.C. §1346	passim
18 U.S.C. §1952	5
28 U.S.C. §1254(1)	2
18 U.S.C. 371	5
Mass. G.L. c. 268A, §3	21 n.14
Mass. G.L. c. 268B, §3(i)	21 n.14
Mass. G.L. c. 268B, §4	21 n.14
Mass. G.L. c. 268B, §5	13 n.8, 21 n. 14
Mass. G.L. c. 268B, §6	21 n.14
Supreme Court Rule 10A	22

TABLE OF AUTHORITIES (continued)

	Page(s)
Constitutional Provisions	
U.S. Const. Art. I, §6	14 n.9
U.S. Const. amend. I	16
U.S. Const. amend. XIV	16

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 149 F.3d 46. Appendix (App.) 1a. The district court did not issue an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 20, 1998. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are reproduced at Appendix B. App. 57a.

STATEMENT OF THE CASE

Francis H. Woodward served as a member of the Massachusetts House of Representatives from 1977 until April, 1992. App. 2a. From January, 1985 through January, 1991, Woodward acted as the House Chair of the Joint Committee on Insurance. Id. During Woodward's tenure as the Chairman of the Insurance Committee, John Hancock Mutual Life Insurance Company ("John Hancock") was one of the two largest insurance companies in Massachusetts. Id. John Hancock employed F. William Sawyer as a Senior Legislative Counsel in the Government Relations Department. Id. In that capacity, he was responsible for lobbying the Massachusetts legislature and primarily the Insurance Committee on insurance legislation. App. 3a.

As a result of their respective positions, Woodward and Sawyer maintained a professional relationship throughout Woodward's service in the Massachusetts legislature. App. 8a. In addition, the two maintained a close personal relationship which extended to their families as well. Beginning in the early 1980s,

the Sawyer family typically spent time at the Woodwards' summer home on Cape Cod. App. 9a. In addition, Woodward and Sawyer, along with their wives, routinely traveled together to COIL (Conference of Insurance Legislators) conferences held several times each year, and socialized together there. Id. At trial, Woodward's wife testified that the Sawyers were one of three couples with whom the Woodwards were closest. Id.

The government's case against Woodward contained two prongs - receipt of gratuities from Sawyer and favorable official action toward John Hancock. App. 5a, 8a. With respect to the former, the government focused on expenditures by Sawyer on Woodward for the period from 1984 to 1992. Sawyer paid for these expenditures with a credit card, which he then submitted for reimbursement by John Hancock. App. 6a. The expenditures took several forms, primarily shared meals, golf and entertainment. App. 5a.[1]

Review of Sawyer's expenditures on Woodward reveals a total of $8,740 expended on Woodward by Sawyer from March 28, 1984 to January 23, 1992. Id. Of that total, only $1,827 was expended on Woodward during the statute of limitations period. Id. Within the limitations period only $487.47 was expended on Woodward while he was the House Chair of the Insurance Committee. Id. The remaining $1,340 was expended by Sawyer after Woodward had been purged from leadership and was a rank and file member of the Transportation Committee, when he had

---

[1] Included in the latter category was a trip for Woodward and his wife to the 1986 Super Bowl in New Orleans. This expenditure was by far the largest by Sawyer ($1,809, or approximately 21% of the total expenditures for the eight-year period) and although it occurred well before the statute of limitations and prior to the passage of 18 U.S.C. §1346, evidence of the trip was admitted at trial to prove Woodward's intent and state of mind with respect to the conspiracy count.

lost all potential utility to the life insurance industry and John Hancock in particular. Id.

The second prong of the government's case concerned official action by Woodward favorable to John Hancock. Rather than attempt to link gratuities received by Woodward to a specific official act, the government sought only to show a more generalized pattern of gratuities in return for ongoing favorable official action.

The Insurance Committee considered approximately three hundred bills per year during Woodward's tenure as chair. App. 3a. Once assigned, the Committee held public hearings on the bills after which committee members voted to recommend the bills favorably or unfavorably. App. 4a. In addition to his responsibilities as a committee member, as the House Chair of the Insurance Committee, Woodward (along with his Senate co-chair) was responsible for staffing the committee, supervising staff, and scheduling public hearings and executive sessions. Id. Furthermore, once the Committee voted to recommend a bill favorably, the chair of the committee was usually charged with "carrying" the bill throughout the legislative process.[2] Id.

In support of its contention that Woodward was influenced in the performance of his official duties, the government relied upon Woodward's legislative action in connection with several bills supported by John Hancock. Specifically, the government adduced evidence that Woodward consistently opposed a bill which would

---

[2] The parties disputed whether "carrying" legislation meant active involvement in promoting a bill's passage or merely ministerial tasks. The circuit court concluded that the jury could fairly infer that the term meant active involvement. App. 4a n. 1.

have required mandatory discounts on life insurance for nonsmokers. App. 25a. The bill was opposed by the industry, including John Hancock, and eventually received a favorable recommendation from the Insurance Committee based on the support it received from Woodward's co-chair. Id. Despite this fact, the bill was ultimately defeated when Woodward led the opposition to it in debate before the full House of Representatives. Id. In addition, the government also pointed to Woodward's support of other legislation supported by the industry, including bills allowing life insurance companies to change the way in which they valued real estate assets to adjust pension funds to provide financial services and to be flexible in corporate governance and finance. Id.

As evidence tending to refute this theory, Woodward pointed to thirty-one specific documented instances where he took positions on legislation which were adverse to John Hancock's interests. App. 26a. Most notable among these instances was Woodward's support of H6394, a bill introduced in 1990 which would have effectively deprived John Hancock of the state employee health insurance contract, thereby creating a potential loss to John Hancock of some $200 million. In addition, Woodward presented evidence showing his consistent support of so-called "mandated benefit" bills which required the provision of certain services by insurers and therefore were steadfastly opposed by the industry.

On July 27, 1995, a grand jury sitting in the District of Massachusetts returned a 28 count indictment charging Woodward with violations of 18 U.S.C. §§371, 1341, 1343, 1346 and 1952. App. 59a-77a. When reduced to its essence, the indictment alleged Woodward used the mails and wires in furtherance of a scheme to defraud the citizens of the Commonwealth of Massachusetts of their

right to his honest services as an elected state representative. The indictment further charged that Woodward used the facilities of interstate commerce in aid of his efforts to commit bribery.[3]

After a nine-day trial, the jury acquitted Woodward of 23 of the 28 counts charged in the indictment. The four substantive counts of which Woodward was convicted stemmed from the November, 1990 COIL conference in Orlando, Florida. The district court subsequently entered judgment of acquittal on one of the Travel Act counts prior to sentencing Woodward to six months in a community treatment center and ordering him to pay a $5,000 fine.

On appeal, the First Circuit Court of Appeals affirmed Woodward's convictions. The circuit court rejected Woodward's contention that the evidence was insufficient to establish his guilt beyond a reasonable doubt on the counts of convictions. Furthermore, the circuit court found no reversible error in the district court's jury instructions or evidentiary rulings. Woodward subsequently sought and obtained a stay of the circuit court mandate and filed this petition.

---

[3] The majority of the Travel Act counts simply recycled the mailings and wirings alleged in the honest services counts for the purpose of establishing a jurisdictional predicate.

THE CIRCUIT COURT'S EXPANSION OF HONEST SERVICES FRAUD TO PERMIT CONVICTION WITHOUT PROOF THAT THE DEFENDANT PERFORMED A SPECIFIC OFFICIAL ACT IN EXCHANGE FOR A GRATUITY, OR THAT HE WOULD NOT HAVE PERFORMED THE ACT BUT FOR THE GRATUITY, CONFLICTS WITH THE LANGUAGE AND INTENT OF 18 U.S.C. §1346, AND WITH OTHER CIRCUIT COURT OF APPEALS DECISIONS

In the decision below, and its predecessor, U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996),[4] the First Circuit Court of Appeals acknowledged that it had embarked on an expansion of the traditional scope of honest services fraud by a public official (or lobbyist) under 18 U.S.C. §1346. Prior to Sawyer, honest services fraud involving public officials was typically confined to "quid pro quo bribery or blatant conflict of interest," Sawyer, 85 F.3d at 741, as quoted in Woodward, App. 13a. More specifically, these involved: "(1) bribery, where a legislator was paid for a particular decision or action, or (2) failure to disclose a conflict of interest, resulting in personal gain." App. 11a (emphasis added).

Sawyer, as reiterated in Woodward, "expanded category (1) from quid pro quo bribery, to include a more generalized pattern of gratuities to coax 'ongoing favorable official action,'" id.

---

[4] The First Circuit characterized the instant case as "the sequel" to Sawyer. App. 2a.

quoting Sawyer, 85 F.3d at 730.[5] Thus, Woodward's acceptance of Sawyer's gratuities was not deemed for the purpose of influencing specific legislative action on behalf of John Hancock, Sawyer's employer. App. 12a; Sawyer, 85 F.3d at 730. Rather, the jury could have inferred that Woodward knew "that the gratuities would continue as long as he voted favorably to Hancock's interests ..." App. 19a; see also Sawyer, 85 F.3d at 730 (Sawyer "may have intended the legislators generally to treat preferentially Hancock's interests, knowing that the free meals, entertainment, and golf would continue so long as favorable action were, at some point, taken").

The circuit court acknowledged that its Sawyer-Woodward rulings expanded the traditional scope of honest services fraud by a public official. It conceded that "prosecutions on facts like these have not generally been brought," Sawyer, 85 F.3d at 741, and that it was a "novel" prosecution. Id. at 742. Furthermore, it viewed the government's theory as "an expansive reading of the federal statutes", and expressed some concern "about the lack of fair warning of a prosecution such as this one ..." Id.

---

[5] The First Circuit effected an expansion of the second category as well, without acknowledging that it was doing so. The cases previously involving a failure to disclose a conflict of interest had typically involved a public official involved in official conduct with respect to a particular matter in which he, or an associate, had a hidden interest, and thus stood to profit. See, e.g., U.S. v. Paradies, 98 F.3d 1266, 1275 (11th Cir. 1996) (city council member failed to disclose ownership interest in company receiving financial benefit of his actions), cert. denied, 117 S.Ct. 2483 (1997); U.S. v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (city budget director failed to disclose that friend had significant interest in firm awarded city insurance contract); U.S. v. Keane, 522 F.2d 534, 538 (7th Cir. 1975) (alderman used position to secure preferential treatment for property in which he maintained undisclosed interest).

In endorsing this expansive reading, the circuit court has placed itself at odds with other circuits, which have confined honest services fraud by public officials in a gratuity context to cases in which the official received the gratuity (or bribe) in exchange for his being influenced to take official action on a particular matter of importance to the donor; action which the official would not otherwise have taken. See Appendix D (listing history of honest services cases involving public officials both pre- and post-18 U.S.C. §1346); see also U.S. v. Bloom, 1998 U.S. App. LEXIS 15988 at *23-24 (7th Cir. July 13, 1998) (holding, in context of scheme to defraud private entity of honest services, "[g]iven the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity . . . it is best to limit the intangible rights approach to the scope it held when the Court decided . . . [U.S. v.] McNally [483 U.S. 350 (1987)]"). With the exception of the cases noted below, no other case has been located in which the official's receipt of a gratuity, or other item of value, was not linked to particular official action which the donor wished him to take and which the official would not have taken but for the gratuity.[6]

By permitting the requisite fraudulent intent to be made out by the inference that legislators understood that the free meals and entertainment would not continue unless "favorable official acts were, at some point, taken," Sawyer, 85 F.3d at 730, the circuit court has extended the theft of honest services to previously uncharted territory. This excursion suffers from several

---

[6] The only cases which adopt the First Circuit's expansion of the honest services doctrine do so either without supporting authority or in exclusive reliance on Sawyer. See U.S. v. Williams, 1998 U.S. Dist. LEXIS 8352 at *5 (D. D.C. May 29, 1998); U.S. v. Espy, 989 F. Supp. 17, 28 (D. D.C. 1997); U.S. v. Bissell, 954 F. Supp. 841, 862-63 (D. N.J. 1996).

deficiencies which would extend §1346 beyond the scope of its language and underlying intent, without the "clear statement" required by McNally, 483 U.S. at 359-60. These deficiencies, each of which will be addressed in turn, would allow conviction for honest services fraud under §1346 (or for Travel Act offenses under §1952):

1. Without requiring evidence of a direct link (whether by direct or circumstantial evidence) between a particular gratuity and resulting favorable action;

2. Without evidence that the official action taken in consideration for the gratuity related to a specific matter of importance to the donor;

3. Without evidence that the official action favorable to the donor would not have been taken by the official but for his receipt of the gratuity; and

4. By allowing the government to substitute evidence of failure to disclose the conflict of interest for evidence of intent to be influenced to favor the donor.[7]

First, the major change wrought by Woodward and Sawyer is to depart from the line of caselaw requiring "quid pro quo bribery," App. 13a, by which honest services defendants nearly always received a particular item of value in consideration of taking action favorable to the donor (or donor's associate). See, e.g., U.S. v. Evans, 148 F.3d 477, 1998 U.S. App. LEXIS 16957

---

[7] Although not framed in these terms before the circuit court, the question of the nature and extent of proof of fraudulent intent necessary for a §1346 conviction was central to Woodward's appellate arguments. The instant argument is thus reasonably related to, and implicit in, the arguments which Woodward advanced on sufficiency of the evidence of fraudulent intent. Brief of Appellant (hereinafter "Br.") 19-25; the proper jury instruction on dual intent (Br. 35-42); the reach of §1346 (Br. 49-50); and void for vagueness (Br. 50).

at *5-6 (5th Cir. July 24, 1998) (state parole officer received bribes of cash and drugs in return for allowing parolee to violate conditions); U.S. v. Lopez-Lukis, 102 F.3d 1164, 1165 (11th Cir. 1997) (member of Board of County Commissioners sold votes to lobbyist and took steps to ensure that majority of Commissioners voted for projects favored by lobbyist); Paradies, 98 F.3d 1275 (11th Cir. 1996) (member of city council received cash payments for votes on issues before committee), The circuit court abandons this link by allowing conviction where a series of ongoing goodwill expenditures ostensibly encouraged generally supportive action by Woodward to ensure his continued receipt of such expenditures. App. 18a-19a.

Second, the traditionally required link is further eroded by not requiring the government to point to specific favorable action performed by Woodward as a result of the expenditures. Typically the official action sought by the donor in consideration for the gratuity is clearly articulated by the donor and understood by the official-recipient. See, e.g., Silvano, 812 F.2d at 755-57. Based on the circuit court's ruling here, however, all the government must show is that the defendant understood the free meals and entertainment would cease unless "favorable acts were, at some point, taken." Sawyer, 85 F.3d at 730 (emphasis added). The haziness of the connection between the acts taken and the gratuities given is accentuated by the permissible distance in time between the two, and the imprecision of the particular favorable acts to be performed.

Third, that haziness is reinforced by the absence of any qualification of the term "favorable acts." Id. Are these legislative acts which Woodward would have taken, on their merits, even if he had not been wined and dined by Sawyer, and which happen to be consistent with Hancock's interests? A theft of honest services

can only be made out in a gratuity case if in exchange for the gratuity, the defendant engages in "biased decision making," Sawyer, 85 F.3d at 724. The bias is made out only if the votes, or other decisions, were motivated or influenced by the gratuities, rather than by other, benign factors.

Finally, Woodward follows Sawyer by stating that the government can demonstrate Woodward's intent to deprive the public of his honest services without any evidence of his being influenced by the gratuities to perform official acts. This is because as an alternative to such evidence, he can be shown to have failed to disclose a conflict of interest, resulting in personal gain. Woodward, App. 17a, 29a.

This formulation is problematic in two respects. First, it allows substitution of failure to disclose a conflict for evidence of the defendant official being "influenced or otherwise improperly affected in the performance of his duties." App. 17a. Without the latter, there can be no honest services fraud, and the failure to disclose is an inadequate substitute for it. See United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978) (finding no deprivation of honest services where state representative introduced friend's firm to public officials responsible for awarding city contracts, where defendant played no role in such awards and did not otherwise fail to fulfill his official duties, and where government cited no standard requiring defendant to disclose his interest in the contracts); United States v. McNeive, 536 F.2d 1245, 1246 (8th Cir. 1976) (finding no deprivation of honest services of city plumbing inspector despite acceptance of unsolicited gratuities, where inspector's administrative duties were non-discretionary and no evidence that gratuities deterred McNeive from conscientiously performing duties). For if a public official fails to disclose a conflict of interest, but never acts on the conflict

by taking biased official action which he would not otherwise have taken, then the failure to disclose is irrelevant and, in and of itself, not enough to constitute a deprivation of honest services.[8]

The second problem with allowing this alternative formulation of intent is that it allows substantial overlap and confusion between two separate and distinct elements of honest services fraud: intent to deprive the public of honest services and intent to deceive. Both Sawyer, 85 F.3d at 725-32, 732-34, and Woodward, App. 17a-29a, 29a-32a, emphasize the distinct nature of these two elements. Yet the circuit court permits their collapse into one. App. 31a- 32a.

To determine the proper scope of §1346 we are guided by the language of the statute, the intent of Congress as gleaned by the legislative history (and the absence therein of any McNally "clear statement"), and the boundaries of honest services fraud which have been drawn by most circuit courts of appeals interpreting it. These guideposts tell us that conduct of a public official in a gratuities or bribery case runs afoul of §1346 only when: (1) the official receives a gratuity; (2) in exchange for receipt of the gratuity the official performs or agrees to perform (3) a specific or particular official act on a matter of importance to the donor; and (4) which the official would not have performed but for his receipt of the gratuity. See Appendix D. In addition, and not by way of substitution, the government must prove the defendant intended to deceive the public, e.g. by concealing or failing to disclose his receipt of gratuities or other conflict of interest.

By straying from these principles, and allowing conviction on a lower standard of honest services fraud, the circuit court has

---

[8] It may, however, as in this case, constitute a violation of a state disclosure or reporting requirement. See Mass. G.L. c. 268B, §5.

blurred, perhaps beyond recognition, the line separating benign from fraudulent conduct, and has created grave risks of conviction for the former without proof of the latter. The circuit court's relaxation of the quid pro quo requirement so as to allow conviction despite no evidence of a link between a particular gratuity and a particular action simply encourages both sides to "cherry-pick" isolated actions and invite the jury to guess whether they were or were not motivated by a desire generally to continue receiving benefits.[9] This unfairly puts at risk public officials based on a "scorecard" mentality[10] derived from which side of the industry position their votes or actions fall, without regard to

---

[9] Resolution of this issue also implicates the Speech or Debate Clause U.S. Const. Art. I, §6, in the context of a federal legislator. See U.S. v. Brewster, 408 U.S. 501, 527 (1972) (privilege not triggered in bribery prosecution of Senator only because "inquiry into legislative performance [was] not necessary").

[10] The manifest dangers of this "scorecard" mentality are amply illustrated in the instant case. The circuit court pointed to evidence of five specific bills during Woodward's six year tenure as House Chair of the Insurance Committee which were significant to Hancock (or the insurance industry) and which Woodward supported. App. 25a. There was also evidence of 31 bills of significance to Hancock on which Woodward acted contrary to Hancock's interests. App. 26a. Surprisingly, the circuit court "bought" the government's argument that since there were only 31 bills the defense could point to on which Woodward opposed the industry (out of about 600 bills of importance to the industry), that must mean that Woodward supported the industry on the other 569. App. 26a-27a. Why wasn't the point that if the government could only show five bills on which Woodward supported Hancock, then he must have opposed the company on the other 595? In fact, the defense did not make any such "extrapolation" argument becuase it would have been disingenuous to do so. Both sides were simply marshalling those bills on which there was evidence both that they were important to Hancock and that Woodward acted either consistently with or contrary to Hancock's expressed desires on them. There was no evidence one way or the other on any of the remainder of the approximately 600 specific bills of importance to Hancock, and thus to derive any conclusions as to them is speculative at best and intellectually dishonest at worst.

whether they arrived at those positions due to the merits, due to the gratuities, for other reasons, or for a combination thereof.

The question is an important one for this Court to address and resolve not just because of its threat to the legislative process but also because it goes to the heart of traditional honest services fraud. The expansion wrought by the circuit court would broaden greatly the scope of conduct embraced by such fraud. Within the broadened scope would lie conduct which was otherwise benign and honest. Theft of honest services has traditionally connoted dishonesty in the execution of official duties. See Appendix D. Rather than receipt of money, expenditures, or other items of value in exchange for favorable official action, the theory as now articulated by the circuit court would require no such showing of dishonesty, and would invite conviction on the basis of otherwise benign conduct, thus implicating overbreadth concerns.[11]

As the circuit court noted in Sawyer, "[t]he practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." 85 F.3d at 741, quoted in Woodward, App. 13a. The circuit court has now criminalized conduct which "itself may not be very different, except in degree, from routine cultivation of friendship in a lobbying context," which does not violate federal criminal law. App. 13a; see also Sawyer, 85 F.3d at 741 (noting "the close

---

[11] Woodward preserved in the Court of Appeals his position that §1346 was void for vagueness as applied to public officials. See Br. at 49-50. Although he argued void for vagueness rather than overbreadth, both implicate the First Amendment, and the distinction is not meaningful. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381 n. 3 (1992) (for purposes of petition for certiorari, claim that ordinance regulated content of speech in violation of First Amendment was "fairly included" in questions whether ordinance was overbroad and void for vagueness in violation of First Amendment); Kolender v. Lawson, 461 U.S. 352, 358 n. 8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.")

relationship between lobbying activities that are lawful from the standpoint of federal law, even if deplorable, and associated or slightly more extreme versions of such conduct that can constitute federal violations").

This newfound distinction between lawful and unlawful gratuities is too blurred to survive constitutional scrutiny. Turning as it does on the lobbyist's intent in paying for meals, golf, and entertainment, and the legislator's intent in receiving them, it simply creates too great a risk that the defendant can be convicted for predominantly lawful conduct, e.g. Woodward's performance of official acts which by happenstance were favorable to Hancock but which were influenced by Woodward's view of the merits and not his receipt of the gratuities. In this context, as interpreted by the circuit court, §1346 offends the Constitution because it is overbroad, i.e. its reach extends to, and it permits conviction for, lawful as well as unlawful activity. See Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (statute prohibiting member of Communist Party from obtaining passport struck down as overbroad; Act infringed upon constitutionally protected right to travel for legitimate, as well as illegitimate, purposes). Moreover, such a blurred distinction between lawful and unlawful conduct also potentially deprives the defendant of liberty without due process of law, in violation of the Due Process Clause. See Kolender, 461 U.S. at 361-62 (law requiring loiterer to give "credible and reliable" information to police officer deemed standardless and encouraged arbitrary enforcement); Papachristou v. City of Jacksonville, 405 U.S. 156, 164-65 (1972) (statute outlawing "loafing" and "wandering or strolling about from place to place" cast too wide a net to put defendant on notice of prohibited conduct).

THE CIRCUIRT COURT'S ENDORSEMENT OF JURY INSTRUCTIONS ALLOWING CONVICTION FOR DE MINIMUS UNLAWFUL INTENT THREATENS THE CRIMINALIZATION OF LAWFUL CONDUCT IN VIOLATION OF THE CONSTITUTION

The circuit court's antidote to the blurred distinction between lawful legislator-lobbyist conduct, and honest services fraud, is a jury instruction which purports to carve out the distinction for jurors in meaningful terms. In Sawyer the circuit court stated that "where, as here, the line between the merely unattractive and actually criminal conduct is blurred, the court must take pains to explain the difference to the jury." Sawyer, 85 F.3d at 741. Taking such pains means:

> the jury needs to be told specifically that the defendant has not violated the bribery component of the Travel Act (or committed honest services fraud) if his intent was limited to the cultivation of business or political friendship. Only if instead, or in addition, there is an intent to cause the recipient to alter his official acts may the jury find a theft of honest services or the bribery predicate of the Travel Act.

Id.

The relevant instruction in Woodward's trial was as follows:

> You may not find that the defendant violated either set of federal laws which I have described to you if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official legislative duties. If instead or in addition, there is an intent on the

> defendant's part to be influenced in his official legislative duties, then you may find a violation of either set of federal laws. If there is both the intent to cultivate a business and political friendship and the intent to be influenced in official legislative duties, then you may find a violation of the federal laws.

App. 51a (emphasis added).

The difficulty with this instruction, and the mandate of Sawyer and Woodward, is that the instruction does not properly account for the allocation of lawful versus unlawful intent in a dual intent case. As the circuit court noted in Woodward, "[r]elationships among human beings, especially among lobbyists and elected officials, will frequently not follow a bright-line pattern, falling on one side or the other of some magical wall dividing friendship from attempts at unlawful influence." App. 48a. In light of this common mix of lawful and unlawful intent in honest services (and other) cases, it is all the more important to ensure that defendants are only convicted with the necessary quantum of unlawful intent in the mix to suffice for conviction, and that a jury instruction is crafted which delineates clearly that standard.

This the circuit court has failed to do, in both Sawyer and Woodward. In Sawyer, the court dealt only obliquely with the dual intent issue. 85 F.3d at 741. In Woodward, confronted with a specific request for a dual intent instruction, the district court expanded somewhat on Sawyer's proposed instruction by adding a final sentence dealing explicitly with the dual intent issue.

That instruction was upheld by the circuit court, App. 45a-53a, in a two-part analysis. First the court disagreed with Woodward's appellate contention that in a dual intent case the illegal portion of the mix needs to be more than minor, incidental,

or de minimus. App. 52a. The court stated that even assuming Woodward was correct and that a conviction should not stand if the illegal intent is de minimus or insignificant, this did not mean the district court erred in failing to give such an instruction. Id. While "[t]he law may require a certain degree of illegal intent in order to convict," the court said, it does not follow that an explicit instruction to that effect was required. Id. Even if the instructions "were not technically adequate" in the absence of such instruction, the court found Woodward not to be prejudiced by the error because in the court's view evidence showed he had more than a de minimus degree of intent to defraud the public of his honest services. Id.[12]

The circuit court's Woodward and Sawyer opinions leave a yawning jurisprudential gap. This is not a question of whether a jury instruction is "technically adequate." It is, instead, a question of precisely how to instruct a jury in a dual intent case so that it does not convict when the intent is overwhelmingly benign. Such a conviction would trample on due process rights effectively by allowing conviction without a necessary element of fraudulent intent. See Thompson v. City of Louisville, 362 U.S. 199, 204 (1960) (no evidentiary support for conviction). While the Woodward instruction upheld by the circuit court would require some quantum of illegal intent, that portion of the mix could be so nominal as to be the functional equivalent of no evidence on that element. In the context of this case, it could effectively criminalize the status of being a legislator and having a personal relationship with a lobbyist.

---

[12] In our view, this should be a matter for a properly instructed jury to determine.

Left unaddressed by the circuit court are several fundamental questions which must be answered to ensure that any honest services conviction comports with the language of §1346, the First Amendment, and the due process clause. First, may a defendant be convicted of an intent offense when his conduct is carried out with a predominantly lawful motive, and the unlawful component of the mix is but minor or incidental? We believe he may not, and that such a conviction would offend the Due Process clause of the Fourteenth Amendment and principles of overbreadth and void for vagueness. Secondly, where does the line get drawn so as constitutionally to permit conviction in honest service fraud and other commonly dual intent cases? Third, how does that line get communicated to juries in a clear and precise fashion so as to ensure constitutional discharge of their fact-finding function?

These questions are fundamental to the resolution of the proliferating number of honest service and other cases in which defendants commonly engage in conduct with a dual intent. Because these important questions have not squarely been addressed by this Court,[13] but should be, Supreme Court Rule 10(c), this Court should grant the Petition.

---

[13] While the court in U.S. v. Anderson, 417 U.S. 211, 226 (1974), held that a conspiracy may be made out where the purpose to violate federal law is secondary in nature, that decision left unanswered the precise issue raised here.

THE CIRCUIT COURT'S AFFIRMANCE OF THE MAIL AND WIRE FRAUD COUNTS CONTRAVENES ESTABLISHED PRECEDENT OF THIS COURT AND VALIDATES THE GOVERNMENT'S ATTEMPT TO CONTRIVE FEDERAL JURISDICTION OVER ISSUES PROPERLY RESOLVED AT THE STATE LEVEL

A. Introduction

At its core, this case presented evidence of an alleged scheme by a member of the state legislature, elected in a state election, to violate three provisions of a state statutory scheme enforced civilly by the State Ethics Commission and (where criminal penalties attach) by the state Attorney General.[14] By the simple expedient of appending an interstate telephone call to Count 9, and a mailing to Count 4, the government elevated to the federal criminal level what would have been a simple, clearcut enforcement action by the State Ethics Commission had the Commission chosen to proceed with it, as the Commission did on numerous other instances involving Sawyer's good will

---

[14] Mass. G.L. c. 268A, §3 punishes by criminal penalty or civil fine the solictation or acceptance of items of substantial value for or because of an official act. Mass. G.L. c. 268B, §6 creates a civil penalty for the solitication or acceptance of gifts in aggregate of one hundred dollars in a calendar year. Mass. G.L. c. 268B, §5 also imposes a civil penalty for failure of public officials to file Statements of Financial Interest listing gifts received from any person with a direct interest in legislation. The Massachusetts State Ethics Commission acts as the primary civil enforcement agency for all violations of c. 268A and c. 268B. Mass. G.L. c. 268B, §3(i). The Commission also has the power to refer alleged violations to the Massachusetts Attorney General's Office for criminal prosecution. Mass. G.L. c. 268B, §4.

entertainment of legislators.[15] As will be shown, the telephone call and mailing are too attenuated to have been for the purpose of "executing" the scheme, or to have "furthered" it, and thus served as pretexts to invoke federal jurisdiction over alleged offenses which were clearly of a state character. By ruling to the contrary, and viewing this wiring and mailing as in furtherance of the scheme, the circuit court put itself in conflict with well-defined rulings of this Court. Supreme Court Rule 10(a).

B. Wire Fraud (Count 9)

The interstate wire transmission supporting Court 9 was a telephone call from Sawyer's office to a Lake Buena Vista, Florida hotel three days before commencement of a COIL conference in that city. It is conceded that the jury could reasonably have inferred that the call was made to reserve a hotel room for Sawyer during that conference. What is not conceded is that the purpose of that call was to execute Woodward's purported scheme to defraud the public of its right to his honest services as a legislator.

The circuit court concludes, App. 49a, that the call was made in furtherance of that scheme because:

> Sawyer would not have been able to give Woodward the illegal gratuities during the COIL conference if Sawyer did not have a hotel room in which to stay for the four days of the conference. The call in question secured that room, and thus played an essential role in the scheme.

---

[15] None of these enforcement actions by the State Ethics Commission against other legislators were accompanied by criminal charges, either state or federal, against the recipients of Sawyer's largesse.

The circuit court's rationale is specious, and reflects the degree to which circuit courts need guidance and clarity from this Court on the "in furtherance" test. Sawyer would indeed have been able to give Woodward the illegal gratuities during the COIL conference even if Sawyer did not have a hotel room in which to stay at the site of the conference. The court itself suggested such a way by pointing to evidence that Sawyer had left another COIL conference early, "but left his credit card to be used for paying Woodward's golf and meal expenses during the remainder of the conference." App. 19a. Consistent with the court's interpretation of the evidence,[16] by giving Woodward his credit card, Sawyer could dispense altogether with his presence at the conference, and with the need for a hotel room.

C. Mailing (Count 4)

The mailing supporting Count 4 was the credit card bill sent by Citibank Visa to Sawyer which included bills for Sawyer's charging of certain gratuities for Woodward 3-4 weeks earlier at another COIL conference. Woodward argued on appeal that because Woodward had already received the gratuities, the scheme had reached fruition, and the credit card bills could do nothing further to execute the scheme, *citing* Parr v. U.S., 363 U.S. 370, 393 (1960); Kann v. U.S., 323 U.S. 88, 94 (1944); and U.S. v. Maze, 414 U.S. 395, 402 (1974).

The circuit court rejected the argument and ruled that the mailing of the credit card bill was in furtherance of the ongoing

---

[16] Evidence showed that while Sawyer did have to leave this conference early, his wife remained at the conference. It is more reasonable to infer that she used her husband's credit card to continue to socialize with her close friends the Woodwards than that Sawyer gave it to Woodward to use.

scheme by which Sawyer continued, for years, to give gratuities to Woodward by charging entertainment on his credit card. App. 36a.

> Every month, Visa would use the mails to bill Sawyer for his charges; if Sawyer did not pay those bills, his credit line would have been terminated and the gratuities could not have continued as Woodward and Sawyer expected. It was thus a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail.

Id. (citation omitted).

The reasoning is both specious and in conflict with Maze, Parr, and Kann. First, whether or not Sawyer paid the bills was unrelated to Citibank's mailing of them. Those were routine, monthly mailings, the existence of which (as Citibank would readily attest) in no way assured Sawyer's payment of them which the Court depicted as a prerequisite to continuation of the scheme.

This depiction, too, is fundamentally unsound. If Sawyer chose not to pay the credit card payments, it likely would have eventually resulted in the termination of that particular credit card. But that would not have doomed the scheme, which could have continued unabated in many alternative ways: other credit cards of Sawyer's, a Hancock credit card, traveler's checks, cash, other Hancock employees. To suggest that the mailing of the bill to Sawyer furthered the scheme because the scheme would have come to an abrupt halt if Sawyer did not pay those bills is a great stretch beyond the Court's "fruition of the scheme" rule. Conflicting as

it does with these rulings,[17] and illustrating the potential abuse of mailings and wirings contrived to procure federal criminal jurisdiction over a state regulatory scheme, this ruling is ripe for review by this Court. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 119 (1973).

D. Conclusion

This case illustrates the tenuousness of the link between an interstate wiring (or a mailing) and the underlying fraudulent scheme, as currently interpreted by many circuit courts. If that link is to have any vitality, it remains for this Court to narrow the gap which currently divides mailings/wirings from the scheme, and to ensure that they are not strangers to one another. By making the jurisdictional requisite truly further the scheme (rather than be a barely relevant appendage to it), this Court can curb the practice of federalizing state and local offenses which should properly be enforced by state agencies armed with state statutes.

---

[17] On this issue, the circuit court's decision is in conflict with Evans, 148 F.3d 477, 1998 U.S.App. LEXIS 16957 (5th Cir., July 24, 1998) (mailing of travel vouchers insufficient to support mail fraud conviction where scheme had reached fruition prior to mailings; use of mail fraud statute constituted improper attempt to manufacture federal jurisdiction over state crime.)

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, Massachusetts 02108
(617) 720-5090

Counsel for Petitioner

September 16, 1998